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IN THE DISTRICT COURT OF GUAM

DAVID J. LUJAN,

Plaintiff,

vs.

GIRARDI|KEESE, a general partnership;
GRAHAM LIPPSMITH, an individual;
the J.L.H. TRUST, a Cook Islands Trust;
KEITH A. WAIBEL, an individual and as a
Trustee of the J.L.H. TRUST;
ROGER SLATER, an individual;
GRANT THORNTON, a Guam entity; and
DOES 1 through 20,

Defendants.

CIVIL CASE NO. 09-00017

OPINION AND ORDER RE: UNITED STATES
MAGISTRATE JUDGE’S REPORT AND
RECOMMENDATION CONCERNING PLAINTIFF’S
MOTION TO REMAND CASE TO SUPERIOR
COURT OF GUAM

INTRODUCTION

The matters before the court are the Defendants’ Objections (Docket Nos. 54 and 56) to the Magistrate Judge’s Report and Recommendation (Docket No. 51) concerning the Plaintiff’s Motion to Remand (Docket No. 12).¹ The Magistrate Judge recommends the undersigned (1) **GRANT** the Plaintiff’s Motion to Remand, (2) **DENY** the Plaintiff’s request to impose attorney fees and costs against the Defendants, and (3) **DECLINE TO TAKE FURTHER ACTION** on the Girardi Defendants’ multi-part motion on the basis that the court has no jurisdiction over the action to grant the relief sought.

¹ On September 1, 2009, the Defendants filed their respective Objections. *See* Docket No. 54 (Defendants Girard|Keese and Graham Lippsmith) and Docket No. 56 (Defendants Keith A. Waibel, JHL Trust, Roger Slater and Grant Thornton).

1 Under 28 U.S.C. § 636(b)(1)(C) and Rule 72 of the Federal Rules of Civil Procedure, the
2 court may accept, reject, or modify in whole or in part the Magistrate Judge’s recommendation,
3 but must review *de novo* any part to which an objection has been filed. Upon full review of the
4 entire record, the court finds the Report and Recommendation of the Magistrate Judge to be well
5 founded in law. Accordingly, the Report and Recommendation is **ADOPTED AND AFFIRMED** and
6 the Objections are **OVERRULED**.

7 **RELEVANT PRIOR PROCEEDINGS**

8 On June 2, 2009, Defendants Girardi| Keese and Graham Lippsmith (“Girardi
9 Defendants”), joined by Defendants Keith A. Waibel, the JLH Trust, Grant Thornton and Roger
10 Slater (“Slater”) (collectively the “Trust Defendants”), removed a Superior Court of Guam
11 action to this court on the basis of diversity jurisdiction. *See* Docket Nos. 1 and 5. On June 8,
12 2009, the Girardi Defendants filed a Motion to Sever and Dismiss or, in the Alternative, Transfer
13 or Stay Plaintiff’s Defamation Claim. *See* Docket No. 7. On June 16, 2009, David J. Lujan
14 (“the Plaintiff”) filed a Motion to Remand arguing that removal was improper because there is
15 not complete diversity of citizenship between the parties. *See* Docket Nos. 12 and 13. On June
16 30, 2009, the matters were referred to the Magistrate Judge. *See* Docket No. 17.

17 On July 13, 2009, the Girardi and Trust Defendants filed their respective oppositions to
18 the Plaintiff’s Motion to Remand. *See* Docket Nos. 20 and 22. On July 20, 2009, Plaintiff filed
19 his reply briefs to the oppositions. *See* Docket Nos. 37 and 38. On August 11, 2009, the
20 Magistrate Judge heard oral argument. Kathleen Fisher and Rodney Jacob appeared on behalf of
21 the Plaintiff. Representing the Girardi Defendants was Joseph Razzano, and representing the
22 Trust Defendants was G. Patrick Civile. On August 18, 2009, the Magistrate Judge issued the
23 Report and Recommendation.² *See* Docket No. 51. Presently before the court are the
24 Defendants’ Objections (Docket Nos. 54 and 56) to the Magistrate Judge’s Report and
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27 ² As noted herein, the Girardi Defendants filed a Motion to Sever and Dismiss or, in the
28 Alternative, Transfer or Stay Plaintiff’s Defamatory Claim. *See* Docket No. 7. Finding that the
court was without jurisdiction, the Magistrate Judge declined to take action on this motion.

1 Recommendation.³ See Docket Nos. 54 and 56. After reviewing the record and filings, the court
2 overrules the Objections.

3 BACKGROUND

4 In 1995, Larry L. Hillbloom (“Hillbloom”), one of the founders and former owner of
5 DHL Worldwide Express, died in an airplane crash, leaving behind an estate worth
6 approximately \$550 million and four pretermitted children, including a son, Junior Larry
7 Hillbloom (“Junior”). See Docket No. 1⁴, Compl., ¶ 14, and Exh. A, ¶ 14-15. At the time of
8 Hillbloom’s death, Junior was 11 years old. *Id.*, ¶ 14. Junior’s guardian retained the Plaintiff to
9 represent Junior’s interests in the estate. *Id.*

10 By 1997, it was settled that Junior would receive 15% of the Hillbloom estate. *Id.* at ¶¶
11 19 and 24. In 1998, the Plaintiff executed a retainer agreement with Junior’s guardians (the
12 “1998 Retainer”). *Id.* at ¶ 22. This agreement provided that the Plaintiff and co-counsel would
13 receive 38% of Junior’s recovery from the estate for their legal work.⁵ *Id.* In 1999, Junior’s
14 share of these funds were placed in the JLH Trust for Junior’s benefit, and Defendant Keith A.
15 Waibel (“Waibel”) was named as the Trustee. *Id.* at ¶ 23. After the settlement of the estate and
16 appointment of Waibel as Trustee, Plaintiff and co-counsel, Barry Israel (“Israel”) and Joe Hill
17 (“Hill”) entered into an Amended Retainer Fee Agreement in 1999 (the “1999 Retainer”) with
18 the JLH Trust. *Id.* at ¶ 27. The JLH Trust agreed to increase the contingency fee of 38% to 56%
19 in exchange for Plaintiff and co-counsel’s continued representation. *Id.*

21 ³ The court notes that without waiting for a ruling on the Objections to the Report and
22 Recommendation as to whether this court has diversity jurisdiction, the Trust Defendants, joined by
23 the Girardi Defendants have since filed a Motion to Stay Or, in the Alternative, Transfer the Action.
See Docket Nos. 62 and 63.

24 ⁴ Attached to the Notice of Removal, Docket No. 1, is the Plaintiff’s Complaint (hereinafter
25 referred to as “Compl.”), and attached thereto is the First Amended Complaint filed in the Central
26 District of California, *Junior Larry Hillbloom v. David J. Lujan*, Civil Case No. 09-00841 (the
“California Action”) (hereinafter referred to as Exh. A).

27 ⁵ Attorneys Lujan and Israel served as counsel for Junior in underlying guardianship and
28 probate proceedings in Guam and in the Commonwealth of the Northern Mariana Islands.

On February 3, 2009, Junior, through his attorneys Defendants Graham Lippsmith (“Defendant Lippsmith”) and the law firm of Girardi|Keese initiated an action entitled *Junior Larry Hillbroom v. David J. Lujan*, Civil Case No. 09-00841 in the Central District of California (the “California Action”).⁶ See Docket No. 1, Compl., ¶ 37 and Exh. A. The suit alleges claims against the Plaintiff, Israel, and Waibel for legal malpractice, negligence, breach of fiduciary duty, fraud, RICO violations, civil conspiracy, and violations of the California Business and Professional Code. *Id.*, Exh. A.

Jurisdiction in the California Action was based on federal question jurisdiction and diversity jurisdiction. See Docket No. 1, Exh. A. The first amended complaint, filed April 22, 2009, alleged a broad conspiracy among the defendants to defraud Junior out of millions of dollars he received in connection with the settlement of his father’s multi-million dollar estate. *Id.* Junior asserted the Defendants fraudulently and secretly increased their retainer agreement from 38% to 56%. *Id.*, Exh. A. ¶ 38. Junior alleged that Waibel, in his capacity as Trustee, overpaid the Plaintiff and Israel millions of dollars in attorneys’ fees and costs. *Id.*, at ¶¶ 46–49

On May 11, 2009, the Plaintiff filed a Complaint in the Superior Court of Guam⁷ (the “Complaint”) against the Girardi and Trust Defendants. In his Complaint, the Plaintiff asserted the following six causes of action:

CLAIM		DEFENDANT(S)
I	Defamation	Girardi Keese and Lippsmith
II	Intentional Interference with Contract	Waibel, Slater, and Grant Thornton
III	Aiding and Abetting in Breach of Duty	Waibel, Slater, and Grant Thornton
IV	Contribution	Waibel
V	Equitable Indemnification	Waibel
VI	Breach of Contract	Waibel and JLH Trust

⁶ In the California Action, Junior is represented by the Girardi|Keese law firm, and Graham Lippsmith is an attorney employed at the law firm.

⁷ *Lujan v. Girardi-Keese*, Superior Court of Guam Case No. CV-0776-09.

1 The defamation claim against the Girardi Defendants stems from statements Attorney Lippsmith
2 made during an interview with KUAM, a local tv station, following the filing of the California
3 Action. *See* Docket No. 1, Compl. Claims II through VI of the Complaint involve disputes
4 arising from the Plaintiff's Retainer Agreements with the JLH Trust. *See id.*, Compl.

5 STANDARD OF REVIEW

6 When a party files a timely objection to a magistrate judge's report and recommendation,
7 "[a] judge of the court shall make a de novo determination of those portions of the report or
8 specified proposed findings or recommendations to which objection is made." 28 U.S.C. §
9 636(b)(1)(C) (2005); *see Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991); *see also*
10 Fed.R.Civ.P. 72(b)(3) (stating "[t]he district judge must determine *de novo* any part of the
11 magistrate judge's disposition that has been properly objected to"). "A judge of the court may
12 accept, reject, or modify, in whole or in part, the findings or recommendations made by the
13 magistrate judge." 28 U.S.C. § 636(b)(1)(C); *see also* Fed.R.Civ.P. 72(b)(3) (stating a district
14 judge "may accept, reject, or modify the recommended disposition; receive further evidence; or
15 return the matter to the magistrate judge with instructions"). Accordingly, the court reviews the
16 Report and Recommendation *de novo*.⁸

17 LEGAL STANDARD FOR REMOVAL

18 Title 28 U.S.C. § 1441(a) permits the removal of "any civil action brought in a State
19 court of which the district courts of the United States have original jurisdiction." In other words,
20 the statute allows a defendant to remove a state court action to federal court only if the action
21 could have originally been filed in federal court. *Id.* There are two bases upon which a district
22 court may exercise removal jurisdiction: the existence of a federal question, *see* 28 U.S.C. §
23 1331, and complete diversity of citizenship among the parties, *see* 28 U.S.C. § 1332. Here, the
24 removing Defendants have alleged only diversity of citizenship as a basis for jurisdiction. The

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26 ⁸ The court conducted a full review of the entire record before it, including the transcript of
27 the hearing before the Magistrate Judge (*see* Docket No. 52), the moving papers, the Magistrate
28 Judge's Report and Recommendation (Docket No. 51), and the Defendants' Objections (Docket
Nos. 54 and 56).

1 court can properly exercise jurisdiction on the basis of diversity if the citizenship of each
2 plaintiff is different than that of each defendant and the case involves an amount in controversy
3 greater than \$75,000. 28 U.S.C. § 1332(a).

4 Federal courts are courts of limited jurisdiction and their authority is carefully
5 circumscribed by the Constitution and Congress. *Alcala v. Holder*, 563 F.3d 1009, 1016 (9th
6 Cir. 2009). Federal courts “are not free to expand [their] jurisdiction to review a decision
7 Congress has placed outside [their] purview.” *Id.* For this reason, the removal statute must be
8 strictly construed.

9 The Ninth Circuit has held that “[t]he strong presumption against removal jurisdiction
10 means that the defendant always has the burden of establishing that removal is proper.” *Gaus v.*
11 *Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (quoting *Nishimoto v. Federman-Bachrach &*
12 *Assocs.*, 903 F.2d 709, 712 n.3 (9th Cir.1990)). The party that seeks to remain in federal court
13 has the burden of proof on a motion to remand to state court. *See Conrad Associates v. Hartford*
14 *Accident & Indemnity Co.*, 994 F. Supp. 1196, 1198 (N.D. Cal. 1998). “Due regard for the
15 rightful independence of state governments, which should actuate federal courts, requires that
16 they scrupulously confine their own jurisdiction to the precise limits which (a federal) statute has
17 defined.” *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 212 (1971) (quoting *Healy v. Ratta*, 292
18 U.S. 263, 270 (1934)). Since the removal statute is strictly construed against removal
19 jurisdiction, the court must reject federal jurisdiction if there is any doubt as to whether removal
20 was proper. *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003)
21 (“Where doubt regarding the right to removal exists, a case should be remanded to state court.”).

22 LEGAL STANDARD FOR MOTION TO REMAND

23 In this case, the Plaintiff moves to remand this case on the ground that there is no
24 diversity jurisdiction. As noted, “[w]hen an action is removed based on diversity, complete
25 diversity must exist at removal.” *Gould v. Mut. Life Ins. Co.*, 790 F.2d 769, 773 (9th Cir. 1986).
26 Ordinarily, the court relies only on the face of the complaint to determine if diversity is present.
27 *See Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). Here the existence of
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1 diversity jurisdiction certainly does not appear on the face of the Complaint since non-diverse
2 Defendants– Slater and Grant Thornton (the “Guam Defendants”) have been joined in the action.
3 *See* Docket No. 1, Compl. at ¶¶ 1, 6 & 7.⁹

4 All Defendants concede that on the face of the Complaint, diversity jurisdiction is
5 lacking. However, they argue that the court should disregard the Guam Defendants for
6 jurisdictional purposes because they were “fraudulently joined” or are “sham defendants.” *See*
7 Docket No. 1. In addition, the Girardi Defendants separately argue that they were “procedurally
8 misjoined”— a doctrine adopted by the Eleventh Circuit in *Tapscott v. MS Dealer Service Corp.*,
9 77 F.3d 1353 (11th Cir. 1996), *overruled on other grounds by Cohen v. Office Depot, Inc.*, 204
10 F.3d 1069 (11th Cir. 2000). Specifically, the *Tapscott* fraudulent joinder exception applies
11 where a diverse defendant is joined with a non-diverse defendant as to whom there is no joint,
12 several or alternative liability and where the claim against the diverse defendant has no real
13 connection to the claim against the non-diverse defendant. Because there were Objections to the
14 Magistrate Judge’s findings as to the applicability of each theory, the court will separately
15 analyze each one herein.

16 DISCUSSION

17 I. Fraudulent Joinder

18 While federal jurisdiction requires complete diversity, the Ninth Circuit recognizes an
19 exception to that requirement. An action may be removable if joinder of the non-diverse parties
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21 ⁹ According to the Complaint, the citizenship of the remaining defendants is as follows:

- 22 • the Girardi law firm was formed under the laws of California, with its principal place
23 of business in California;
- 24 • Grant Lippsmith is a citizen of California;
- 25 • the JLH Trust is organized and registered under the law of the Cook Islands; and
- 26 • Defendant Waibel is a resident of California.
- 27
- 28

1 is fraudulent. “[F]raudulently joined defendants will not defeat removal on diversity grounds.”
2 *Ritchey*, 139 F.3d at 1318. The Ninth Circuit has explained that “[f]raudulent joinder is a term of
3 art. If the plaintiff fails to state a cause of action against a resident defendant, and the failure is
4 obvious according to the settled rules of the state, the joinder of the resident defendant is
5 fraudulent.” *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987); *Morris v.*
6 *Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001).

7 In determining whether a defendant was joined fraudulently, “the courts must resolve all
8 disputed questions of fact and all ambiguities in the controlling state law in favor of the
9 non-removing party.” *Plute v. Roadway Package Sys.*, 141 F. Supp.2d 1005, 1008 (N.D. Cal.
10 2001)(quotation marks and citation omitted). If “there is any possibility that a claim can be
11 stated against the allegedly ‘sham’ defendant,” then remand is required. *Knutson v.*
12 *Allis-Chalmers Corp.*, 358 F. Supp.2d 983, 995 (D. Nev. 2005). Stated another way, “the
13 defendant must demonstrate that there is no possibility that the plaintiff will be able to establish a
14 cause of action in State court against the alleged sham defendant.” *Good v. Prudential Ins. Co.*, 5
15 F. Supp. 2d 804, 807 (N.D. Cal. 1998). Obviously, this standard is more lenient than the standard
16 for motions to dismiss. *See Knutson*, 358 F. Supp.2d at 995. And “a plaintiff need only have
17 one potentially valid claim against a non-diverse defendant” to survive a fraudulent joinder
18 challenge. *Id.* at 993. “Fraudulent joinder must be proven by clear and convincing evidence.”
19 *Hamilton Materials, Inc. v. Dow Chemical Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). The
20 Ninth Circuit has made clear that joinder is not fraudulent if the plaintiff has stated a colorable
21 claim against the non-diverse defendant.

22 The Girardi and Trust Defendants argue that the joinder of the Guam Defendants is
23 fraudulent because each of the claims brought against them is so unsubstantiated that no true
24 cause of action exists as pertaining to them. Although it is possible to create diversity by proving
25 that there is no viable claim against the Guam Defendants, as discussed above, the Girardi and
26 Trust Defendants have the burden of proof in this regard. The court now turns its attention to
27 whether they have met this heavy burden.
28

1 **A. Whether Plaintiff has Asserted Causes of Action Cognizable Under Guam**
2 **Law Against Guam Defendants**

3 The Plaintiff asserts two causes of action (Claims II and III of the Complaint) against the
4 Guam Defendants: intentional interference with contract and aiding and abetting. *See* Docket
5 No. 1, Compl. at ¶¶52-61. The Girardi and Trust Defendants must establish that, under settled
6 Guam law, it is not possible to bring these claims against the Guam Defendants.

7 In a case in which the court’s diversity jurisdiction is invoked, the court must apply
8 Guam law with respect to matters of substantive law, while applying federal law as to matters of
9 procedure. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996) “It is well-settled
10 that the Federal Rules of Civil Procedure apply in federal court, ‘irrespective of the source of the
11 subject matter jurisdiction, and irrespective of whether the substantive law at issue is state or
12 federal.’” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (quoting *Vess v. Ciba-*
13 *Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003)). “[F]ederal courts sitting in diversity
14 jurisdiction apply state substantive law and federal procedural law.” *Freund v. Nycomed*
15 *Amersham*, 347 F.3d 752, 761 (9th Cir. 2007) (quoting *Gasperini.*, 518 U.S. at 427).

16 **1. *Iqbal* and *Twombly* are Irrelevant to the Issues before the Court.**

17 The Girardi and Trust Defendants object to the Magistrate Judge’s reliance upon Guam’s
18 notice pleading standard. They argue that the Magistrate Judge instead should have applied the
19 heightened pleading standard as set forth by the United States Supreme Court in *Bell Atlantic*
20 *Corp. v. Twombly*, 550 U.S. 544 (2007) and further explained in *Ashcroft v. Iqbal*, 129 S. Ct.
21 1937 (2009). In those cases, the Court addressed the pleading standard as applied to Rule
22 12(b)(6) motions to dismiss. The Supreme Court in *Twombly* stated that Rule 8(a)(2) requires
23 only “a short and plain statement of the claim showing that the pleader is entitled to relief” in
24 order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it
25 rests.” *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). However,
26 in order to survive dismissal for failure to state a claim under Rule 12(b)(6), a complaint must
27 contain more than “a formulaic recitation of the elements of a cause of action”; it must contain
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1 factual allegations sufficient “to raise a right to relief above the speculative level.” *Id.* at 555.
2 The complaint must contain “enough facts to state a claim to relief that is plausible on its face.”
3 *Id.* at 570.

4 In *Iqbal*, the Court interpreted *Twombly* as raising the pleading standard for all actions.
5 The Court in *Iqbal* extended the reach of *Twombly* and instructed that all civil complaints must
6 contain “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 129
7 S. Ct. at 1949. “A claim has facial plausibility when the plaintiff pleads factual content that
8 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
9 alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for
10 more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550
11 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s
12 liability, it ‘stops short of the line between possibility and plausibility for entitlement to relief.’”
13 *Id.* (quoting *Twombly*, 550 U.S. at 557).

14 This court notes that the Ninth Circuit has not discussed the applicability of the pleading
15 standard of *Twombly* and *Iqbal* in the context of a motion to remand. Without more specific
16 direction from the circuit on this matter, it seems the standard this court must apply in a motion
17 to remand differs somewhat from the standard applied in a Rule 12(b)(6) motion to dismiss. The
18 standard to be applied is something akin to a 12(b)(6) type analysis but not as stringent. *See*
19 *Tracey v. American Family Mut. Ins. Co.*, No. 2:09-CV-01257-RCJ-PAL, 2009 WL 3754209, *2
20 (D. Nev. Nov. 5, 2009); *see also Lovell v. United Airlines, Inc.*, No. CIV. 09-00146 ACK-LE,
21 2009 WL 3172729 *3 (D. Haw. Oct. 2, 2009) (“In evaluating the issue of fraudulent joinder, ‘the
22 court may conduct a Rule 12(b)(6) type of analysis, looking at the allegations of the complaint to
23 determine whether the complaint states a claim under state law against the in-state defendant.’”) (citations omitted); *see also Briano v. Conseco Life Ins. Co.*, 126 F. Supp.2d 1293, 1299 n.5
24 (C.D. Cal. 2000)(“[The] inquiry into validity of complaint is more searching under Fed.R.Civ.P.

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1 12(b)(6) than when party claims fraudulent joinder.”) (quoting *Batoff v. State Farms Inc. Co.*,
2 977 F.2d 848, 852 (3d Cir. 1992)).¹⁰

3 The Plaintiff correctly notes that the Magistrate Judge was obligated to evaluate the
4 Motion to Remand under the following standard: “[t]he standard is not whether plaintiffs will
5 actually or even probably prevail on the merits, but whether there is a possibility that they may
6 do so.” See Docket No. 51, Report and Recommendation 6:6-7 (citing *Lieberman v. Meshkin*,
7 *Mazandarani*, 1996 WL 732506 at *3 (N.D. Cal. Dec. 11, 1996). When a removing defendant
8 alleges the district court has diversity jurisdiction on the basis of fraudulent joinder, “the federal
9 court first adopts a strict presumption against removal, and then asks whether there is ‘any
10 chance’ that a state court would find a viable cause of action against a resident defendant.”
11 *Salveson v. Western States Bankcard Ass’n*, 731 F.2d 1423, 1426 (9th Cir.1984) superseded by
12 statute on other grounds by *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389 (9th Cir.
13 2001); see also *Davis v. Prentiss Properties Ltd. Inc.*, 66 F. Supp.2d 1112, 1114 (C.D. Cal.
14 1999)(“If a court were to apply the standard of Rule 12(b)(6) to the diversity-defeating claim, the
15 court would be ignoring the fact that it has no jurisdiction over the claim.”). The defendants
16 essentially request this court ignore this standard in favor of the *Iqbal* standard used in a motion
17 to dismiss. However, as discussed previously, the court finds that that is not what is required by
18 the Ninth Circuit.

19 Accordingly, the proper analysis in this case is to identify whether, on the Complaint
20 itself, regardless of any potential defenses, the Plaintiff could bring the claims asserted against

21
22 ¹⁰ While the court agrees with the Defendants that the Plaintiff’s Complaint is sparse,
23 perhaps so much so that he may have failed to state a cognizable claim against the Guam Defendants
24 under the federal pleading standard articulated by the Supreme Court in *Iqbal*, the substantive merits
25 of his claims are not at issue in the pending motion. Rather the issue of whether this court has
26 jurisdiction pursuant to diversity jurisdiction is a preliminary determination that is wholly separate
27 from an evaluation of the merits of the claims asserted. See *Quackenbush v. Allstate Ins. Co.*, 517
28 U.S. 706, 707 (1996) (characterizing the issue of jurisdiction as “separate from the merits”); *In re*
Briscoe, 448 F.3d 201, 218 (3d Cir.2006) (“because it is possible that a party is not fraudulently
joined, but that the claim against that party ultimately is dismissed for failure to state a claim upon
which relief may be granted, [a] district court ... err[s] in converting its jurisdictional inquiry into
a motion to dismiss.”) (quotations omitted).

1 the Guam Defendants. The court must remand if the Defendants fail to meet their heavy burden
2 in showing that under settled Guam law the Plaintiff cannot state a cause of action against them
3 in a Guam court. *McCabe* 811 F.2d at 1339. “[W]here it is doubtful whether the complaint states
4 a cause of action against the resident defendant, the doubt is ordinarily resolved in favor of the
5 retention of the cause in the state court.” *Albi v. Street & Smith Publications*, 140 F.2d 310, 312
6 (9th Cir. 1944). The motive for the joinder is immaterial and a merely defective statement does
7 not warrant removal under fraudulent joinder. *Id.* Only where there is no reasonable ground for
8 supposing that a plaintiff has a cause of action will the court find that there is fraudulent joinder.
9 *Id.* In the remand context, the district court's authority to look into the ultimate merit of the
10 plaintiff's claims must be limited to checking for obviously fraudulent or frivolous claims.

11 With these principles in mind, the court will now evaluate the validity of Plaintiff's claims.

12 **2. Intentional Interference with Contract**

13 The Plaintiff alleges in the second cause of action of the Complaint that Waibel and the
14 Guam Defendants intentionally interfered with his right to receive payment under the Retainers.
15 To state a claim for intentional interference with contract under Guam law, a plaintiff must allege:

- 16 (1) the existence of a valid contract between the plaintiff and a third party,
- 17 (2) the defendant's knowledge of that contract,
- 18 (3) an act by the defendant intended to induce a breach or disruption of the contractual
19 relationship,
- 20 (4) an actual breach or disruption of the contract, and
- 21 (5) resulting damages.

22 *See Brown v. Eastman Kodak Co.*, CV1890-92 (Super. Ct. Guam Dec. 30, 2005) (Bordallo) at 6;
23 *Preuc v. Continental Micronesia, Inc.*, CV 0069-96 (Super. Ct. Guam Dec. 14, 1999) (Unpingco)
24 at 15; *JWS Refrigeration and Air Conditioning, Ltd. v. Engineering Mgmt. and Consulting Co.,*
25 *Inc.*, CV 1133-87 (Super. Ct. Guam Dec. 22, 1988) (Diaz) at 8. After reviewing the Plaintiff's
26 Complaint, the Magistrate Judge found that the Plaintiff had alleged each of these elements.
27 Both the Girardi and Trust Defendants claim the Magistrate Judge's finding in this regard was in
28

1 error. The court will address each objection in turn.

2 **a. Sufficient facts alleged**

3 In their Objections, the Girardi Defendants assert the Magistrate Judge erred when he
4 found there were sufficient facts supporting the claim. *See* Docket No. 54. They assert that the
5 elements for tortious intentional interference are unsupported by the factual allegations leveled at
6 the Guam Defendants. This court disagrees and overrules the Objection. The Magistrate Judge
7 did not err in finding sufficient facts. The Complaint alleges the following facts that connect the
8 Guam Defendants to the claim.

9 Concerning the first element of a valid contract, the Plaintiff describes the 1998 Retainer
10 Agreement he entered into with Naoko Imeong, Junior's co-guardian and co-guardian *ad litem*.
11 *See* Docket No. 1, Compl., ¶22. Pursuant to that agreement, the Plaintiff and co-counsel would
12 receive 38% of Junior's recovery from his father's estate. *Id.* Additionally, the Plaintiff
13 discusses the 1999 Retainer between the Plaintiff and the JLH Trust under which the
14 contingency fee was increased to 56%. *Id.* at ¶27.

15 As to the second element of the Defendant's knowledge, in ¶53 of the Complaint, the
16 Plaintiff asserts that Waibel and the Guam Defendants were aware of the existence of the
17 Retainer agreements. *See* Docket No. 1, Compl. at ¶53.

18 The third element is satisfied by ¶36 which alleges that the JLH Trust, Waibel and the
19 Guam Defendants developed a scheme to blame the Plaintiff for the poor state of the JLH Trust
20 and that the Guam Defendants created accountings to try to get the Plaintiff to forego his right to
21 receive payment due under the Retainers and to coerce him to pay millions of dollars to the JLH
22 Trust. *See* Docket No. 1, Compl. at ¶36.

23 The fourth element of an actual breach of contract is satisfied by ¶40 wherein the
24 Plaintiff asserts that the JLH Trust received a substantial amount of money in federal tax refunds
25 and, under the terms of the Retainers, he was to receive a percentage of these funds. The Plaintiff
26 claims that Waibel caused the JLH Trust not to pay the Plaintiff his share of several million
27 dollars. *See* Docket No. 1, Compl. at ¶40.

1 Lastly, ¶¶36, 40 and 55 satisfy the fifth element’s required showing of resulting damages.
2 *See* Docket No. 1, Compl. at ¶¶36, 40 and 55.

3 These allegations, judged by the deferential standard the court must apply on a motion to
4 remand, are sufficient to constitute at least a colorable claim under Guam law. They aver that the
5 Guam Defendants were aware of the Retainers, and finally that they were not parties to those
6 agreements, that they intentionally induced the JLH Trust to breach those Retainers; that the JLH
7 Trust did breach the Retainers. The Plaintiff further alleges that as a result of these actions he
8 suffered damages, thus entitling him to punitive damages. Docket No. 1, Compl. ¶¶ 52-56, 69-72.

9 **b. Guam Defendants as Agents**

10 The Magistrate Judge found that whether the Guam Defendants were acting as agents for
11 the JLH Trust or for Waibel in his individual capacity is a question of fact best left for the
12 Superior Court to decide. The Trust Defendants object to the Magistrate Judge’s conclusion in
13 this regard. Specifically, they argue that there is but one entity– the JLH Trust, and the Trustee–
14 and they do not stand separate from one another. Thus, the Guam Defendants could not have
15 interfered with the Retainers because they “were the agents of the real-party-in-interest to the
16 Retainers and are not ‘third-parties’ who can be liable for interfering with them.” *See* Docket
17 No. 56, Objections, p. 6:20-21.

18 Plaintiff, on the other hand, contends that the law is unsettled in terms of whether trusts
19 can be considered as distinct legal entities.

20 “Increasingly, modern common-law and statutory concepts and terminology
21 tacitly recognize the trust as a legal “entity,” consisting of the trust estate and the
22 associated fiduciary relation between the trustee and the beneficiaries. This is
23 increasingly and appropriately reflected both in language (referring, for example,
to the duties or liability of a trustee to “the trust”) and in doctrine, especially in
distinguishing between the trustee personally or as an individual and the trustee in
a fiduciary or representative capacity.”

24 RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

25 In fact, there is authority in Guam law which suggests that the Guam Defendants could
26 be liable if they are found to have been acting as agents of Waibel in his individual capacity and
27 not as agents of Waibel in his capacity of Trustee. The Superior Court of Guam has recognized
28

1 that “the agent immunity rule does not preclude the subjection of agents to conspiracy liability
2 for conduct which the agents carry out as individuals for their individual advantage and not
3 solely on behalf of the principal.” *Calvo v. Guam Medical Plaza, L.P.*, CV1289-02 (Super. Ct.
4 Guam Aug. 19, 2005) (Bordallo) at 4 (internal quotations omitted). Whether the Guam
5 Defendants were acting as agents for the JLH Trust or for Waibel in his individual capacity is a
6 question of fact for a jury to decide. *See Armored Express Serv. Inc. v. The Baldwin Corp.*,
7 CV1601-01 (Super. Ct. Guam Apr. 21, 2004) (Lamorena) at 5.

8 The Plaintiff also points out that the Girardi and Trust Defendants have not filed any
9 declaration or submitted facts which prove the existence of an agency relationship with the JLH
10 Trust to counter the Plaintiff’s contentions that the Guam Defendants were agents of Waibel in
11 his individual capacity. Neither have they cited to any Guam or Ninth Circuit case or statute that
12 supports their position. The Magistrate Judge found that the Guam Defendants’ assertion of
13 agent immunity goes to the merits of the action and is better propounded as a defense to an
14 otherwise valid cause of action. This court agrees.

15 There appears to be no basis to conclude that, under settled Guam law, the Plaintiff is
16 absolutely precluded from asserting a tortious interference claim against the Guam Defendants.
17 The Trust Defendants have failed to satisfy their heavy burden to prove there is no possibility
18 that the Plaintiff will be able to prevail on the merits of his claims. *See In re Briscoe*, 448 F.3d at
19 218 (The claim must be “wholly insubstantial and frivolous” to be considered fraudulent.).
20 Accordingly, the Trust Defendants’ Objection is overruled.

21 3. Aiding and Abetting a Breach

22 In the third cause of action the Plaintiff alleges that the Trust Defendants are guilty of
23 aiding and abetting the JLH Trust’s refusal to pay amounts due and owing the Plaintiff under the
24 Retainers. *See* Docket No. 1, Compl. ¶¶ 57-61. The Magistrate Judge determined that the
25 Plaintiff was alleging a cause of action for aiding and abetting a breach of fiduciary duty. In
26 their Objections, the Girardi and Trust Defendants assert the Magistrate Judge erred when he
27 made such a finding. They contend that there is no language in the Complaint suggesting the
28

1 Plaintiff is alleging a cause of action for aiding and abetting a breach of fiduciary duty. They
2 argue the Plaintiff's cause of action is one for aiding and abetting a breach of contract— a claim
3 which is not viable. *See Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 413 n.6 (7th Cir.
4 2000)(holding that § 876 of the Restatement (Second) of Torts, which sets out cause of action
5 for, among things, providing substantial assistance or encouragement to another's tortious acts.
6 Because a breach of contract is not a tortious act, § 876 does not support class counsel's aiding
7 and abetting claim . . .”).

8 While the Plaintiff is correct that there is no language indicating the cause of action is
9 one for aiding and abetting a breach of fiduciary duty, it is likewise true that there is no language
10 in the Complaint that precludes the Plaintiff from alleging such an action. As the Magistrate
11 Judge understood “all doubts concerning the sufficiency of a cause of action because of inartful,
12 ambiguous or technically defective pleading must be resolved in favor of remand, and a lack of
13 clear precedent does not render the joinder fraudulent.” *Plute*, 141 F. Supp.2d at 1008 (citation
14 omitted); *see also Little v. Purdue Pharma, LP*, 227 F. Supp.2d 838, 849 (S.D.Ohio 2002) (“a
15 federal court should hesitate before pronouncing a state claim frivolous, unreasonable, and not
16 even colorable in an area yet untouched by the state courts.”).

17 With that standard in mind, the Magistrate Judge looked to Guam law in laying out the
18 elements of a cause of action for aiding and abetting a breach of fiduciary duty. *See TNN Guam,*
19 *Inc. dba Hotel Nikko Guam v. Jale Management Information Services, Inc. dba Information and*
20 *Data Systems*, CV0516-07 (Super. Ct. Guam June 26, 2008 and July 6, 2009) (Maraman).¹¹

21
22 ¹¹ This decision recognized for the first time on Guam the tort of aiding and abetting a breach
23 of fiduciary duty. The Plaintiff requests the court to take judicial notice (*see* Docket No. 66) of the
24 Guam Supreme Court's Order, *Bank of Guam v. TNN Guam, Inc.*, CVA-09020 (Nov. 12, 2009).
25 Pursuant to Rule 201 of the Federal Rules of Evidence the court grants the request. The court notes
26 that the Supreme Court previously had agreed to hear an interlocutory appeal in order to determine
27 whether the new tort of aiding and abetting a breach of fiduciary duty is an actionable tort under
28 Guam law. *See* Docket No. 57, attachment thereto. However, in its November 12, 2009 Order the
Supreme Court dismissed the interlocutory appeal based on the parties' agreement to a voluntary
dismissal. *See* Docket No. 66, Exh. A attached thereto. The dismissal therefore leaves the cause
of action for aiding and abetting a breach of fiduciary duty unsettled.

1 According to the *TNN Guam* decision, the elements of the common law tort of aiding and
2 abetting breach of fiduciary duty are: (1) the primary tortfeasor breaches a fiduciary duty which
3 he owes to the victim-plaintiff; (2) the aider-abettor defendant has actual knowledge of the
4 breach, i.e., the specific primary wrong; (3) the aider-abettor defendant lends the primary
5 tortfeasor substantial assistance or encouragement in committing the breach; and (4) the victim-
6 plaintiff suffers damages proximately caused by the breach.

7 The Magistrate Judge also found that the Plaintiff had pled sufficient facts in order for
8 the court to infer that the Trust Defendants owed him a fiduciary duty. *See* Docket No. 51,
9 Report and Recommendation 10:4-16. The existence of the first element may be found in ¶40 of
10 the Complaint. Therein, the Plaintiff alleges entitlement to a share of a substantial amount of
11 money the JLH Trust received in federal tax refunds and that Waibel caused the JLH Trust not to
12 pay the Plaintiff his share of said funds as required by the terms of the Retainer Agreements. *See*
13 Docket No. 1, Compl. ¶40. While these allegations do not specifically mention the existence of
14 a “trust,” when read liberally this paragraph alleges the existence of a constructive trust over the
15 funds resulting from Defendant Waibel’s actions in causing the JLH Trust not to pay the Plaintiff
16 his rightful share. Additionally, assertions regarding the breach of fiduciary duty can also be
17 found in ¶60 of the Complaint. *See* Docket No. 1, Compl. ¶60.

18 As to the second element requiring actual knowledge of the breach by the aider-abettor,
19 the court finds this element satisfied by the assertion in ¶58 that the Trust Defendants knew that
20 the JLH Trust’s refusal to perform under the terms of the Retainers constituted a breach of duty
21 to the Plaintiff. *See* Docket No. 1, Compl. ¶58.

22 The third element requiring substantial assistance is sufficiently pled in ¶59, and the fourth
23 element – damages – can be found in ¶¶40 and 61. *See* Docket No. 1, Compl. ¶¶40, 59 and 61.

24 This court agrees with the Magistrate Judge’s finding that the Complaint sufficiently
25 states a cause of action against the Guam Defendants for aiding and abetting a breach of
26 fiduciary. Accordingly, the Objections are overruled.

27 Even if this court agreed with the Defendants that the Plaintiff’s cause of action is one for
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1 aiding and abetting a breach of contract, this court would still be unable to find the Plaintiff
2 fraudulently joined the Guam Defendants. As noted, the Defendants contend that the claim is
3 not viable. However, it seems that such a cause of action is recognized elsewhere. *See, e.g.*
4 *Lincoln Gen. Ins. Co. v. U.S. Auto Ins. Services, Inc.*, No. 3:07-CV-1985-B, 2009 WL 1174641
5 at *11 (N.D. Tex. 2009)(“this case does not persuade the Court that the Plaintiff has failed to state
6 a claim by alleging Defendants ‘encouraged, aided and/or abetted’ U.S. Auto’s breach of
7 contract.”).

8 It is unclear whether Guam law will recognize such a claim. However, it is not for this
9 court to speculate as to how the local courts will rule on the matter. It is a matter that should be
10 left to the local courts to decide. *See Cava v. NetVersant-Nat, Inc.*, No. C 07-3224 SBA, 2007
11 WL 4326754 at *4 (N.D. Cal. 2007) (“the Court may not make final determinations with regard
12 to questions of state law that are not well-settled.”) *see also Knutson v. Allis-Chalmers Corp.*,
13 358 F. Supp.2d 983, 996, n. 10 (D. Nev. 2005) (“Federal district courts are not entitled to
14 determine uncertain issues of law in order to ascertain whether there has been a fraudulent
15 joinder, as those issues must be determined in state court.”); *see also Macey v. Allstate Prop. and*
16 *Cas. Ins. Co.*, 220 F. Supp.2d 1116, 1117. (N.D. Cal. 2002) (“If there is a non-fanciful
17 possibility that plaintiff can state a claim under [state] law against the non-diverse defendants the
18 court must remand.”).

19 For purposes of remand, it is important for this court to note only that it remains an
20 unsettled area of Guam law. To defeat remand, defendants must establish that it “is obvious
21 according to [the] settled [law] of the state” that the Plaintiff has failed to state a cause of action
22 against the Defendants. *See McCabe*, 811 F.2d at 1339. “If there is doubt as to whether plaintiff
23 has stated a cause of action, the joinder is not fraudulent, and the case should be remanded.”
24 *Parks v. New York Times Company*, 308 F.2d 474, 478 (5th Cir.1962). Accordingly, remand is
25 required.

26 **4. The Guam Defendants Are Not “Sham Defendants”**

27 When read as a whole and not in isolation, the allegations in the Complaint sufficiently
28

1 allege causes of action against the Guam Defendants under the second and third claims. The
2 court cannot say that the Plaintiff “fails to state a cause of action against a resident defendant,
3 and the failure is obvious according to the settled rules of the state . . .” *McCabe*, 811 F.2d at
4 1339. The fact that the party may lose or even the fact that the party will probably lose does not
5 affect the party’s right to present its claim, make its arguments, and receive a ruling from a court
6 with proper jurisdiction. Thus, if a diversity-defeating claim is not frivolous, the plaintiff has the
7 right to have it considered by the state court in which it was filed. *See Salveson*, 731 F.2d at
8 1426 (The Plaintiff has the right to frame his complaint so as to “pitch his claim in state court.”);
9 *see also Davis*, 66 F. Supp.2d at 1114 (“The Court must therefore walk a very fine line; it must
10 consider the merits of a matter without assuming jurisdiction over it.”).

11 The court finds that the Guam Defendants are not “sham defendants.” Because the
12 removal statute is strictly construed against removal jurisdiction, even when a cause of action is
13 inartfully or ambiguously pled, the court finds the Girardi and Trust Defendants have failed to
14 establish that the second and third causes of action of the Complaint are “obviously” precluded
15 by “settled Guam law.” *Alderman v. Pitney Bowes Mgmt. Servs.*, 191 F. Supp.2d 1113, 1116
16 (N.D. Cal.2002) (“[D]oubt arising from merely inartful, ambiguous, or technically defective
17 pleadings should be resolved in favor of remand.”); *Dodson v. Spiliada Maritime Corp.*, 951
18 F.2d 40, (5th Cir. 1992)(All ambiguities in state law must be resolved in the plaintiff’s favor.).
19 Therefore, the court rejects the Girardi and Trust Defendants’ argument that the joinder of the
20 Guam Defendants should be ignored for the purpose of determining whether diversity
21 jurisdiction exists.

22 **II. Magistrate Judge Correctly Applied *McCabe***

23 The Trust Defendants fault the Magistrate Judge’s application of *McCabe*. In *McCabe*,
24 the plaintiff alleged that he was wrongfully discharged by his former employer and two
25 corporate employees acting in a managerial capacity, whose wrongful conduct was ratified by
26 the former employee. 811 F.2d at 1337. The district court found that the corporate employees
27 had been fraudulently joined because they could not be found liable as individuals under well
28

1 settled California law. *Id.* at 1339. The plaintiff attempted to amend his complaint, to remove
2 the allegation that the managers' acts were ratified, and adding allegations that the managers
3 acted solely in their own self-interest. *Id.* at 1338. The district court denied plaintiff's attempt to
4 amend, concluding that it was offered only to destroy diversity, and imposed Rule 11 sanctions.
5 *Id.*

6 The Ninth Circuit affirmed. *Id.* at 1339. The court stated:

7 On the basis of the complaint alone, the district court could rightly conclude that
8 no cause of action had been stated against Moltz and Ladson. Their actions,
9 according to the complaint, had been in their managerial capacity. Their actions,
10 according to the complaint, had been ratified by General Foods. They were not
11 alleged to have acted on their own initiative. McCabe's own declaration alleged
12 that they were motivated "in part" by ill will. But it is clear that "if an advisor is
13 motivated in part by a desire to benefit his principal," his conduct is, under
14 California law, privileged.

15 *Id.*

16 **A. The Magistrate Judge Correctly Applied *McCabe* to the Claim for**
17 **Intentional Interference with Contract**

18 The Trust Defendants argue that *McCabe* is indistinguishable from the present case. As
19 in *McCabe*, the Plaintiff alleges the role of the Guam Defendants: (1) as agents of the JLH Trust
20 and Waibel who acted in the scope of their authority as agents; and (2) that they acted "with the
21 knowledge, consent, ratification, or approval" of the JLH Trust and Waibel. *See* Docket No. 1,
22 Compl. ¶ 10. The Trust Defendants claim that these agency/ratifications are the same as those
23 alleged in *McCabe*.

24 In contrast, the Plaintiff argues that *McCabe* existed in a very different context than that
25 of this case. In *McCabe* there was no dispute over whether the individual defendants were
26 employees of the corporate defendant or that they acted within the scope of their employment.
27 *Id.* at 1340. In Plaintiff's Complaint, by contrast, the substantive fact alleged against the Guam
28 Defendants states they were acting on behalf of Waibel, not the JLH Trust, and against the JLH
Trust's interests. *See* Docket No. 1, Compl. ¶ 36. The court agrees and finds that whatever role
the Guam Defendants may have played in this matter is decidedly unsettled and will likely be the
subject of much contention going forward. Accordingly, the court overrules the Objection.

1 **B. The Magistrate Judge Correctly Applied *McCabe* to the Claim for Aiding**
2 **and Abetting**

3 The Trust Defendants also contend that the Magistrate Judge’s analysis of the aiding and
4 abetting claim was improper. They insist that the claim of aiding and abetting is one of aiding
5 and abetting a breach of contract. However, the court relies upon its previous discussion on the
6 matter of the aiding and abetting cause of action herein and, overrules the Trust Defendants’
7 Objection. As stated previously, “[w]here it is doubtful whether the complaint states a cause of
8 action against the resident defendant, the doubt is ordinarily resolved in favor of the retention of
9 the cause in the state court.” *Albi*, 140 at 312. Only where there is no reasonable ground for
10 supposing that a plaintiff has a cause of action will the court find that there is fraudulent joinder.
11 *Id.* Accordingly, in the remand context, the district court’s authority to look into the ultimate merit
12 of the plaintiff’s claims must be limited to checking for obviously fraudulent or frivolous claims.

13 **III. “Procedural Misjoinder” Theory**

14 While the Girardi Defendants acknowledge that complete diversity does not exist, they
15 nonetheless ask the court to adopt and apply the legal doctrine of procedural misjoinder to defeat
16 the Plaintiff’s motion to remand. The Magistrate Judge refused to apply the doctrine, finding it
17 inapplicable and unsupported by the Ninth Circuit. *See* Docket No. 51, Report and
18 Recommendation, 11:8-14:2. The Girardi Defendants object to the Magistrate Judge’s finding in
19 this regard. They argue that they were procedurally misjoined in this case and should be severed
20 under the doctrine created by the Eleventh Circuit in *Tapscott*. Under the doctrine of
21 “procedural misjoinder,” a plaintiff may *not* defeat diversity jurisdiction simply by fraudulently
22 joining a resident defendant having no real connection with the claim against the diverse
23 defendant. *Id.* at 1360. The Girardi Defendants claim that the Plaintiff misjoined the unrelated
24 claim against them (*i.e.*, Claim I for defamation) with unrelated claims against the Trust
25 Defendants (Claims II - VI). This court overrules the Objection. The Magistrate Judge
26 thoroughly considered the matter when he declined to adopt and apply the doctrine.

27 In *Tapscott*, the case arose in the context of a putative class action filed in Alabama state
28 court, asserting Alabama state law claims. An Alabama plaintiff originally sued four defendants,

1 one of which was an Alabama citizen. 77 F.3d at 1355. The first amended complaint alleged
2 identical claims as the original but added sixteen named plaintiffs and twenty-two named
3 defendants. *Id.* The second amended complaint contained four additional named plaintiffs,
4 Alabama residents, and three additional named defendants, including a North Carolina resident.
5 *Id.* Unlike the initial and first amended complaints, which alleged violations arising from sales
6 of service contracts in connection with the sale of automobiles, the second amended complaint
7 alleged violations of state law arising from the sale of “extended service contracts” in connection
8 with the sale of retail products. *Id.* The result of the amended claims and joinder of parties
9 under Federal Rule of Civil Procedure 20¹² was to create two distinct groups of named plaintiffs
10 and defendants: the “automobile class” which was non-diverse and the “merchant class,” which
11 included the diverse North Carolina resident. *Id.* at 1360.

12 The North Carolina resident removed the case to federal court on diversity of citizenship
13 grounds and filed a motion to sever the claims against him from the claims against the
14 automobile class defendants. *Id.* at 1355. The district court granted the motion to sever the two
15 classes and denied the plaintiffs’ motion to remand because it found “there was no allegation of
16 joint liability between [North Carolina resident] and any other defendant and no allegation of
17 conspiracy.” *Id.* at 1360.

18 The Eleventh Circuit affirmed, holding that the factual commonality among the
19 plaintiffs’ claims against the different classes of defendants was not sufficient to satisfy Rule 20.
20 *Id.* at 1360. The court then held that egregious misjoinder of parties, as measured by Rule 20
21 standards, amounted to fraudulent joinder, permitting the court to disregard the citizenship of the
22 non-diverse defendants in a removed action. *Id.*

23 This case is readily distinguishable from *Tapscott*. In the instant case, there is one
24 plaintiff and two sets of defendants and, unlike *Tapscott*, it is not complex litigation. Second, in

26 ¹² Rule 20(a) imposes two requirements for the permissive joinder of a party: (1) a right to
27 relief must be asserted against each defendant relating to or arising out of the same transaction or
28 occurrence or series of transactions or occurrences, and (2) some question of law or fact common
to all parties must arise in the action. *See* Fed.R.Civ.P. 20(a).

1 *Tapscott*, the joinder of defendants was accomplished “solely through Rule 20.” Here, the
2 Plaintiff sued all the Defendants in the original Complaint and did not attempt to join the Girardi
3 Defendants under Rule 20. As a district court in the Ninth Circuit noted:

4 [t]he fact that in *Tapscott* new defendants were added under Rule 20 is significant
5 because it provided the district court the basis for considering the plaintiff’s
6 motives for joinder, concluding that there had been “improper and fraudulent
7 joinder, bordering on a sham.”

8 *Thakor v. Burlington Ins. Co.*, No. C 09-1465 SBA, 2009 WL 1974511 at *4 (N.D. Cal. July 8,
9 2009).

10 In contrast to *Tapscott*, in which the court found no real connection between the
11 plaintiff’s claims against the diverse and non-diverse defendants, the Plaintiff here alleges facts
12 suggesting there is a connection between all the causes of action asserted in the Complaint. For
13 example, the defamation claim against the Girardi Defendants relate to the Retainers and
14 whether the Plaintiff “stole” money from Junior. *See* Docket No. 1, Compl. ¶ 42. And, the facts
15 necessary to prove the falsity of Defendant Lippsmith’s statement will likely overlap with the
16 facts necessary to prove the Plaintiff’s claims against the Trust Defendants. Clearly there is a
17 nexus between the parties in this case that simply did not exist in *Tapscott*.

18 Accordingly, the court will not apply the *Tapscott* exception to complete diversity– a
19 doctrine the Ninth Circuit has not addressed much less adopted. *See Brazina v. The Paul Revere*
20 *Life Ins. Co.*, 271 F. Supp.2d 1163, 1172 (N.D. Cal. 2003) (noting that the Ninth Circuit has not
21 found occasion to address *Tapscott*, and no other circuit has adopted its rationale); *Osborn v.*
22 *Metropolitan Life Ins. Co.*, 341 F. Supp.2d 1123, 1127 (E.D. Cal.2004) (emphasizing the Ninth
23 Circuit has not adopted the *Tapscott* “misjoinder of parties” theory).

24 Even if the court applied *Tapscott*, the case simply does not stand for the broad rule that
25 all procedural misjoinder is fraudulent. The Eleventh Circuit found the misjoinder was
26 fraudulent in *Tapscott* because it was “so egregious as to constitute fraudulent joinder.” *Tapscott*,
27 77 F.3d at 1360. The Girardi Defendants do not argue that the Plaintiff’s misjoinder is “so
28 egregious” as to be fraudulent. Absent evidence that misjoinder borders on a sham, the reason to
apply *Tapscott* is even less persuasive.

1 Therefore, in the absence of a compelling reason for this court to adopt and apply the
2 *Tapscott* exception to complete diversity, it is clear from the face of the Complaint that complete
3 diversity does not exist, and removal is improper.

4 **IV. Amount in Controversy**

5 Because the Magistrate Judge found the Defendants had failed to meet their burden in
6 establishing that this court has jurisdiction under either the fraudulent joinder or procedural
7 misjoinder doctrine, the Magistrate Judge found it unnecessary to determine whether the amount
8 in controversy exceeds \$75,000.00.¹³

9 The Defendants object. However, there being no complete diversity, this court agrees
10 with the Magistrate Judge that there is no need to address the amount in controversy.
11 Accordingly, the Objections are overruled and will not be addressed further.

12 **V. Reimbursement of Costs and Fees of Removal**

13 As a final matter, in addition to remand, the Plaintiff requests reimbursement of costs and
14 fees associated incurred as a result of removal. The Magistrate Judge declined imposing costs
15 and expenses.

16 Under 28 U.S.C. 1447(c), “[a]n order remanding the case may require payment of just
17 costs and any actual expenses, including attorney fees, incurred as a result of the removal.”
18 Although a district court has wide discretion in assessing fees pursuant to section 1447(c),
19 *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1215 (9th Cir. 2000),
20 absent unusual circumstances, attorney’s fees should not be awarded when the removing party
21 has an objectively reasonable basis for removal. *See Martin v. Franklin Capital Corp.*, 546 U.S.
22 132, 141 (2005); *Patel v. Del Taco, Inc.*, 446 F.3d 996, 999 (9th Cir. 2006). In this case, the
23 court finds that the basis for removal was not so unreasonable as to warrant the imposition of
24 fees upon the Defendants.

25 Moreover, the Plaintiff did not file an Objection to this finding of the Magistrate Judge.

27 ¹³ Diversity jurisdiction exists under Section 1332 only “where the matter in controversy
28 exceeds the sum or value of \$75,000, exclusive of interest and costs.” 28 U.S.C. § 1332(a)(1).

1 Instead he incorporated his request for fees and costs in his Response to Girardi Objections. *See*
2 Docket No. 58. Rule 72 of the Federal Rules of Civil Procedure provides that “[a] party may
3 serve and file objections to the order within 10 days after being served with a copy. A party may
4 not assign as error a defect in the order not timely objected to.” Similarly, 28 U.S.C. §
5 636(b)(1)(C) provides that “[w]ithin ten days after being served with a copy, any party may
6 serve and file written objections to such proposed findings and recommendations as provided by
7 rules of court. A judge of the court shall make a *de novo* determination of those portions of the
8 report or specified findings or recommendations to which objection is made.”¹⁴ It is clear that
9 the Plaintiff’s “objection” was untimely. Accordingly, the Magistrate Judge’s recommendation
10 stands, and an award of fees and costs shall not be awarded.

11 CONCLUSION

12 After reviewing the Plaintiff’s Complaint, the court finds that the asserted claims against
13 the Guam Defendants could probably be better articulated and less ambiguous. Notwithstanding
14 such a finding, the court is unable to conclude that there is no possibility the Plaintiff can set
15 forth a viable claim against the Guam Defendants under Guam law. “[D]oubt arising from
16 merely inartful, ambiguous, or technically defective pleadings should be resolved in favor of
17 remand.” *Alderman*, 191 F. Supp.2d at 1116 (citation omitted).

18 The Defendants, as the removing parties, have failed to satisfy their heavy burden of
19 establishing fraudulent joinder or procedural misjoinder in this case. Accordingly, the court will
20 not disregard the citizenship of the Guam Defendants for purposes of finding diversity jurisdiction.

21 For all of the foregoing reasons, the court finds no error in the specific challenged
22 findings of the Report and Recommendation, or in the overall conclusion of the Magistrate Judge
23 that federal subject matter jurisdiction is wanting. Accordingly, it is hereby **ORDERED** that the
24 Report and Recommendation (Docket No. 51) is Adopted and Affirmed and the Defendants’
25

26 ¹⁴ After December 1, 2009, 28 U.S.C. § 636 was amended to provide a party with fourteen
27 days to serve and file objections. However, when the Report and Recommendation was filed, the
28 rule provided for ten days.

1 Objections (Docket Nos. 54 and 56) to the same are **OVERRULED**. There being no federal
2 jurisdiction over this action the court **GRANTS** the Motion to Remand. Accordingly, this action
3 is hereby remanded to the Superior Court of Guam for further proceedings. All other pending
4 motions not yet ruled upon are deemed moot and will not be considered by this court.¹⁵

5 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Dec 29, 2009

25 _____
26 ¹⁵ The Girardi Defendants object to the Magistrate Judge's recommendation that this court
27 take no action on their multi-part motion (Docket No. 7) on the basis that the court has no
28 jurisdiction over the action to grant the relief sought. Consistent with the rulings herein, the court
overrules the objection.